

**UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

\*\*\*\*\*

**In the Matter of**

\*

\*

**PRESIDENT AND TRUSTEES OF  
BATES COLLEGE**

\*

\*

\*

**Employer**

\*

\*

\*

**Case No. 01-RC-284384**

**And**

\*

\*

**MAINE SERVICE EMPLOYEE ASSOCIATION  
SEIU LOCAL 1989**

\*

\*

\*

**Petitioner**

\*

\*\*\*\*\*

**PRESIDENT AND TRUSTEES OF BATES COLLEGE  
REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S  
DECISION AND DIRECTION OF ELECTION**

James R. Erwin, Esq.  
Pierce Atwood LLP  
254 Commercial Street  
Merrill's Wharf  
Portland, ME 04101  
jerwin@pierceanwood.com

Nicholas DiGiovanni, Esq.  
Rachel Adams Ladeau, Esq.  
Morgan, Brown & Joy, LLP  
200 State Street  
Boston, MA 02109  
ndigiovanni@morganbrown.com  
rladeau@morganbrown.com

*Attorneys for Employer President  
and Trustees of Bates College*

December 30, 2021

## **TABLE OF CONTENTS**

	<b>PAGE</b>
TABLE OF CASES AND AUTHORITIES.....	4
I. INTRODUCTION AND STATEMENT OF THE CASE.....	6
A. Procedural Background .....	6
B. Standard of Review as applied to this case .....	7
II. FACTS .....	8
A. Organization and Overview .....	8
B. College policies and application to faculty; distinguishing elements of faculty work .....	10
C. Governance .....	16
III. ARGUMENT .....	17
A. There are compelling reasons for the Board to grant this Request because a substantial question of law or policy is raised due to the absence of officially reported Board precedent, namely, whether an appropriate bargaining unit at an institution of higher education can include contingent faculty along with all other professional and non-professional staff.....	17
B. The Regional Director’s Decision to include faculty in the same bargaining unit as other College staff is clearly erroneous .....	20
1. General Community of Interests Considerations.....	20
2. Erroneous application of community of interest factors by the Regional Director .....	21
3. The Board’s own guidance accords faculty separate bargaining unit status.....	27
4. State legislatures and labor boards typically separate faculty from other employee bargaining units .....	29
C. The Regional Director erred in ruling that the College was precluded from presenting evidence and argument on the question of the appropriateness of the petitioned-unit because its Statement of Petition was served on the Petitioner one day late .....	31

D. To the extent the Regional Director was following Board rules and precedent in her ruling on preclusion, there are compelling reasons for reconsideration of such rules and precedent .....	33
IV. CONCLUSION .....	35

## **TABLE OF CASES AND AUTHORITIES**

<b>CASES</b>	<b>PAGE</b>
<i>Allen Health Care Services</i> , 332 NLRB 1308 (2000) .....	21
<i>Association of Pennsylvania State Colleges v. Commonwealth of Pennsylvania Labor Relations Board</i> , 383 A.2d 243, 34 Pa. Cmwlth. 239 (1978).....	30
<i>Bradford College</i> , 261 NLRB 565 (1974) .....	29
<i>Brunswick Bowling Products LLC</i> , 364 NLRB No. 96 (2016).....	32
<i>Cornell University</i> 183 NLRB 329 (1970).....	28
<i>Florida Southern College</i> 196 NLRB 888 (1972) .....	28
<i>Goddard College</i> 216 NLRB 457 (1975) .....	29
<i>IKEA Distribution Services</i> , 370 NLRB No. 109 (2021).....	7
<i>Kalamazoo Paper Box Corp.</i> , 135 NLRB 134 (1962).....	24
<i>LeMoyne Owen College v. NLRB</i> , 357 F.3d 55 (D.C. Cir., 2004).....	22
<i>Livingstone College</i> , 290 NLRB 304 (1988).....	18, 28
<i>Long Island University, C. W. Post Ctr.</i> , 189 NLRB 904 (1971) .....	28
<i>Mercy College</i> 231 NLRB 315, 316 (1977).....	29
<i>New York University</i> , 205 NLRB 4 (1973) .....	29
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980).....	17, 25
<i>Northeastern University</i> 218 NLRB 247 (1975) .....	28
<i>Point Park College</i> 209 NLRB 1064 (1974) .....	28
<i>Publix Super Markets, Inc.</i> , 343 NLRB 1023 (2004) .....	21
<i>Rensselaer Polytechnic Inst.</i> , 218 NLRB 1435 (1975) .....	28, 29

<i>Saks &amp; Co.</i> , 204 NLRB 24 (1973).....	21
<i>The Boeing Company</i> , 369 NLRB No. 67 (2019) .....	21
<i>Trustees of Boston Univ. v. NLRB</i> , 575 F.2d 301 (1st Cir. 1978) <i>vacated on other grounds</i> , 445 U.S. 912 (1980) .....	29
<i>Tusculum College</i> 199 NLRB 28 (1972) .....	28
<i>United Operations, Inc.</i> , 338 NLRB 123, 123 (2002) .....	21
<i>URS Fed. Services, Inc.</i> , 365 NLRB No. 1 (2016) .....	31
<i>Williams Sonoma Direct, Inc.</i> , 365 NLRB No. 13 *2 (2017) .....	31

## OTHER AUTHORITIES

Tierney and Corwin, “The Tensions Between Academic Freedom and Institutional Review Boards,” <i>Qualitative Inquiry</i> (Vol.13 Number 3, April 2007).....	26
<i>Outline of Law in Representation Cases</i> , Section 15-262 .....	28

## **I. INTRODUCTION AND STATEMENT OF THE CASE**

### **A. Procedural Background**

Pursuant to 29 C.F.R. Section 102.67(c) and (d), of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, the President and Trustees of Bates College ("College" or "Employer") submits this Request for Review of the Regional Director's Decision and Direction of Election dated December 16, 2021 ("Decision"), in the above-captioned matter.

Bates College is a nonprofit institution of higher education located in Lewiston, ME. It is a renowned residential liberal arts college founded in 1855, with approximately 1800 undergraduate students and, at the time of the hearing, a total of some 938 faculty and employees of all types. On October 8, 2021, the Maine Service Employees Association- SEIU, Local 1989 ("Union" or "Petitioner") filed a Petition for Representation with Region 1 of the NLRB. The Union sought a bargaining unit at the College of "all non-tenure and non-tenure track faculty and all staff... excluding managers, tenured and tenure track faculty, confidential employees, guards and supervisors." The College filed a timely Statement of Position with the Region contending that the unit was inappropriate; however, it served its Statement of Position on the Union one day late. A hearing on the Petition was scheduled by the Region for November 3, 2021.

Because the College's Statement of Position was served one day late on the Petitioner, and based on Section 102.66(d) of the Board's Rules and Regulations, the Regional Director directed the hearing officer to decline to take evidence or allow arguments, including briefs, from the College on the question of whether the petitioned-for unit was appropriate.

The Region conducted a four-day hearing on the Petition on November 3, 4, 5 and 8. At the hearing, a record was developed by the hearing officer to determine if the unit was in fact appropriate. At this hearing, while the College was precluded from calling witnesses and

introducing evidence, the hearing officer, at the instruction of the Regional Director, heard testimony from College officials and received certain evidence in order to create a record for the Regional Director to determine if the unit was in fact appropriate. *IKEA Distribution Services*, 370 NLRB No. 109 (2021). The Union also introduced their own evidence and witnesses.

On December 16, 2021, the Regional Director determined that the Union's petitioned-for wall-to-wall unit of all College employees, including contingent faculty, was appropriate and ordered that an election be held in such a unit. The College files a Request for Review of this Decision and would submit that the Decision should be vacated.

#### **B. Standard of Review as applied to this case**

The Board will grant review of a Regional Director's decision where, as here, compelling reasons exist. Section 102.67(d) of the NLRB Rules and Regulations provide that the grounds for review can be (1) that a substantial question of law or policy is raised because of (i) the absence of...officially reported Board precedent; (2) that the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party; (3) that the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error and (4) that there are compelling reasons for reconsideration of an important Board rule or policy. This request, seeking review of the Decision satisfies this standard in all four respects.

First, there are compelling reasons for the Board to grant this Request because a substantial question of law or policy is raised due to the absence of officially reported Board precedent, namely, whether a wall-to-wall bargaining unit at an institution of higher education can include faculty along with all other professional and non-professional staff. The Regional Director's Decision to allow a combined wall-to-wall unit that combines both faculty members

with all other employees at the College must be reviewed due to the absence of any Board precedent in this regard.

Second, the Regional Director's Decision that faculty do not have a sufficiently distinct community of interest to warrant their exclusion from an otherwise wall-to-wall unit is clearly erroneous.

Third, it was prejudicial error for the Regional Director to rule that the College was precluded from presenting any evidence or argument, including briefs, on the question of whether the petitioned-for unit was appropriate due to the fact that the College's Statement of Position – while timely filed with the Region -- was not served on the Petitioner by noon on October 25 but was served on the Petitioner the following day, one day late.

Fourth, and in connection with the late service, there are compelling reasons for the Board to reconsider its policy of automatic preclusion in a case where the College had cause for the late filing and there was no demonstrable harm to the Petitioner.

## **II. THE FACTS**

### **A. Organization and overview**

Organizationally, the College is headed by the President, Clayton Spencer, who in turn reports to the Board of Trustees. Key administrators under President Spencer are the Vice President for Academic Affairs and Dean of the Faculty (Malcolm Hill); Vice President for Finance and Administration and Treasurer (Geoffrey Swift); Vice President for Institutional Affairs (Michael Hussey); Vice President for College Advancement (Sarah Pearson); Vice President for Campus Life (Josh McIntosh); Vice President for Information and Library Services (Pat Schoknecht); Vice President for Communications and Public Affairs (Sean Findlen); and the



Vice President for Enrollment and Dean of Admission and Financial Aid (Leigh Weisenburger). (Decision, p. 3).

The College's approximately 1800 students live on campus; the College has a total of 938 employees (at the time of the hearing). (Decision, p. 3) All tenured and tenure-track faculty are excluded from the bargaining unit by agreement of the parties, as are all supervisors, managers, confidential employees, guards and per diem and part-time employees with an insufficient employment nexus to warrant inclusion in the unit.

Of the remaining 630 employees (approximately), the large majority are non-exempt, non-professional hourly employees, roughly 395 employees of them, and they are housed in many departments and units around campus, including dining services, facilities and administrative offices. Shuttle drivers, museum attendants, assistant coaches, College store clerks and animal care workers work in various locations around campus. Other members of the proposed unit are professional employees and are based in a variety of departments. They total around 50 individuals, not counting the contingent faculty at issue in this case. (Decision, pp. 4-6)

In particular contention in this matter are 75-95 contingent faculty<sup>1</sup> including the ranks of lecturers, senior lecturers, visiting instructors, visiting assistant professors, visiting associate professors, visiting lecturers and those holding formal lectureships at the College. Along with the tenured/tenure-track faculty, they are considered the "faculty" of the College. Their terms and conditions of employment are covered by the Faculty Handbook (Board Ex. #5) as well as section of the Employee Handbook. (Board Ex. #4) They are each appointed to one of the 22

---

<sup>1</sup> The parties have used the term "contingent faculty" to collectively refer to these particular faculty titles.

academic departments and 10 program academic units alongside their tenured and tenure-track faculty colleagues. (Decision, p. 5)

In terms of their basic work, the contingent faculty, like the tenured/tenure-track faculty, have both teaching and service functions. Visiting Professors teach a full load of five courses a year and are often hired as replacements for tenured faculty who may be on sabbatical or other leaves of absence. Visiting Lecturers serve the same purpose and are distinguished from visiting professors in that they teach less than five courses a year.

Unlike staff, they all serve under contracts of employment. Those faculty (approximately 14 of them) who hold a “lectureship” are hired for a 3-year or 5-year contract term. Other contingent faculty are hired for a term of one year. All such appointments are renewable following a review of performance and assessment of College needs. When an individual completes 14 years of service in a lectureship position and four reviews by the Academic Affairs Council (ACC), they are no longer reviewed for need by the ACC, essentially achieving a *de facto* tenure status. (Decision, p. 5)

**B. College policies and application to faculty; distinguishing elements of faculty work**

In terms of the College’s employee classifications, the faculty, which includes the contingent faculty, are considered as a stand-alone and completely separate employment classification from the rest of the staff employees (and student employees) and are treated as such in many ways. (See Board Ex. #4, Section 200, Employee Handbook,)

The College’s employment rules and policies for its employees are largely spelled out in two documents: the Employee Handbook and the Faculty Handbook. (Board Ex. #4 and 5). There is also a Benefits Handbook that delineates the basic College benefits for all employees, with some exceptions for faculty. (Board Ex. #5).

The vast majority of employees covered in the petitioned-unit are only subject to the provisions of the Employee Handbook, not the Faculty Handbook. Contingent faculty, along with tenured and tenure-track faculty, are covered by the 109-page, highly detailed Faculty Handbook. (See Board Ex. #5) and the confirmation that contingent faculty are covered by the Handbook and considered to be faculty is so stated in that Handbook.

#### Part 1A: Faculty Organization and Procedures

#### Article I: Definition and Duties of the Faculty of the College

##### SECTION 1: THE FACULTY OF THE COLLEGE

Bates College is operated under a charter granted by the State of Maine, which established a corporation and gave to it the authority to adopt by-laws for its governance. Article IX of the by-laws of The Charter and By-Laws of Bates College defines membership of the faculty, broadly defines its authority, and stipulates certain procedures. The entire text of Article IX is as follows:

##### By-Laws of Bates College, Article IX

SECTION 1: The faculty of the College will consist of the president, the deans, the treasurer, and the academic staff including the registrar, the librarian, the principal assistant librarian, the professors, associate professors, assistant professors, instructors, **lecturers, and the visiting professors**. Designation as a member of the faculty confers the right to vote in faculty meetings and serve as a member of faculty committees. (emphasis added)

While many basic policies in the Employee Handbook apply to all College employees including faculty, there are numerous provisions that do not apply and have no relevance to the faculty generally, including contingent faculty. Particularly on many of the most basic issues that would likely dominate collective bargaining, contingent faculty have significantly different working conditions from both the other professional employees and non-professional employees. For example:

1. Nature of their work. Contingent faculty are hired to teach College courses and to engage in related service activities, particularly involvement in the College's governance system. With limited exceptions,

they, along with the excluded tenured/tenure-track faculty, are the only employees of the institution tasked with this function. The faculty's work is markedly different in nature and in delivery mode than any other employees.

2. Job Descriptions. Unlike staff, faculty do not have job descriptions (T. 33, 218)
3. Ranks Faculty carry professorial ranks. (Board Ex. #5, Faculty Handbook, Part II)
4. Job Security. Faculty are the only employees at the College who have binding contracts of employment, running in duration from one to five years, unlike all of the staff of the College who have no contracts and are "at-will employees. (T. 355). Some contingent faculty (those holding lectureships) may eventually achieve "de facto tenure," after working a certain number of years, (T. Vol. III, pp.12-15)

Importantly, unlike staff employees, faculty cannot be terminated except for "adequate cause."<sup>2</sup> See Sections 106 and 200 of the Employee Handbook, which states:

#### **106 EMPLOYMENT AT WILL**

Unless otherwise agreed to in writing signed by an officer of the College, employment with Bates College is at the mutual consent of Bates College and the employee, and either party may terminate that relationship at any time, with or without advance notice and for any reason or no reason. *Employment at will* is a statement of the voluntary nature of the relationship between Bates College and its employees. All employees who do not have a signed employment contract for a specific term of employment are "at-will" employees. **Generally, only faculty and head athletic coaches have written contracts of employment with the College under which they are not "at will" employees.** Neither an initial employment offer, nor any statement or representation in this handbook or in any other College communication should be construed as an implied contract of employment with a specific term or permanent employment. Nothing in this handbook should be read or interpreted as to alter an employee's at-will status. (Emphasis added, Board Ex. #4)

---

<sup>2</sup> This, of course, is not to be confused with the possible non-reappointment once the term contract expires. That is not considered a termination.

## 200 EMPLOYMENT CATEGORIES

Bates College has three categories of employees: **Faculty, Staff (exempt and non-exempt), and Student Employee.** A person is classified as an employee when they receive a payroll check from Bates College. An employee's status and benefit eligibility are determined by their employment category and number of hours worked.

These classifications do not guarantee employment for any specified period of time. Accordingly, the right to terminate the employment relationship at will at any time is retained by both the employee and Bates College. **All employees who do not have a signed employment contract for a specific term of employment** are "at-will" employees in accordance with Maine State Law. (Emphasis added: Board Ex. #4)

The Faculty Handbook provides to the faculty the explicit protection of "adequate cause" for termination and outlines the limited grounds by which a faculty member, including a contingent faculty member on contract, can be terminated by the College:

### ARTICLE VII, SECTION 1: DEFINITION

Termination of the appointment of a faculty member on contract without limit of tenure or within the specified term shall be affected only in cases of adequate cause as defined in the following statements.

- a) Gross neglect of duty resulting in a clearly inadequate performance as a teacher and as a member of the faculty.
  - b) Physical or mental disability of such serious nature as to preclude acceptable performance as a teacher and as a member of the faculty.
  - c) Personal conduct in flagrant conflict with the purposes of teaching and of scholarship and seriously detrimental to the College.
  - d) *Bona fide* financial exigency of the College (Board Ex. #5, Article VII, Section 1, p. 32 of 109)
5. Termination procedures. Faculty, including contingent faculty, have different processes than staff when threatened with discharge, which includes the right to a hearing before the Board of Trustees. (T. 211) No such procedures are offered to any other employees at the College. (See Board Ex. #5, Faculty Handbook, Article VII, Section 2, p. 32-34 of 109)

6. Time off issues. Faculty, including contingent faculty, and unlike all other staff:
  - i. Do not accrue vacation time or personal days (T. 139, 220)
  - ii. Do not accrue or have sick time (T. 139, 220)
  - iii. Do not receive separate holiday pay (T. 221)
  - iv. Do not use time cards (T. 60-62)
7. Level of supervision, working hours and accountability. Faculty, including contingent faculty, have significant freedom to do their work and are not anchored by set times in reporting to work as are other staff employees, provided they are meeting their class responsibilities. They do not have set hours of work (T.60) (Section 109 of Employee Handbook, Board Ex. #4). They do not have to report to a particular office or building or supervisor at any particular time and have freedom to set their own hours, save classes which are scheduled each semester or service meeting obligations (T.60, 271). Unlike staff, they are also not subject to telecommuting policies (T. 214-215)
8. Academic Freedom. In carrying out their teaching and research function, faculty have traditional academic freedom that is ingrained in American higher education and an essential and invaluable protection for faculty members in their work. This freedom is stated in the Faculty Handbook (Board Ex. #5, Article 1, Section 2) and references the widely adopted 1940 Statement on Academic Freedom of the American Association of University Professors. This protection does not apply to any staff member. Faculty are entitled to special procedures when they believe their academic freedom has been violated. (Board Ex. #5, Faculty Handbook, Article VI, Section 6)
9. Evaluations. Faculty have their own evaluation systems, including their own processes for reappointment, promotion and tenure. Also, unlike staff, faculty evaluate each other's work and are involved in decisions on the retention and promotion of faculty (T. 341)
10. Supervision. Faculty are supervised by the Vice President for Academic Affairs and Dean of the College, Malcolm Hill. While he does have non-faculty staff who ultimately report to him, such as museum and registrar employees, the large majority of his reports are the 225 faculty (both tenured/tenure track and contingent). Staff employees for the most part report to intermediate managers and ultimately to the different Vice Presidents for their areas. (Decision, pp. 3-4)

11. Compensation. Faculty have their compensation determined each year very differently from other staff employees both in method and amount. Vice President and Treasurer Swift, who oversees the budget process each year, testified:

And when we do our budgeting process we also think about things in three distinct pools, the faculty pool, exempt and non-exempt. So those are my three different buckets.

HEARING OFFICER MCGRATH: Okay. So there is a -- when you say pools, it sounds like -- pools or buckets, it sounds -- correct me if I'm wrong, I understand you to be saying that the budget for salaries is set in three different pools?

THE WITNESS: That's correct faculty an increase to the overall dean of faculty budget pool and he's able to handle that differently, so that's partitioned aside. And then we usually give a percent increase to our exempt employees and in recent years, we've really been accelerating the increase to our lowest wage. (T. 51-53)

In effect, the Dean of the Faculty is given a pool of money for annual faculty compensation adjustments, which can be allocated to individual faculty members in his or her discretion, unlike any other group of employees. Faculty also have minimum salaries by professorial rank. (Board Ex. #5, Faculty Handbook, Part II)

12. Benefits.

While faculty obviously share many benefits with staff, such as medical insurance and retirement contributions, they do have significant differences in benefits (including different disability benefits and parental leave policies (T. 134) and, for those benefits that they do share with staff, have different methods of determining eligibility, with faculty eligibility based on teaching a certain number of courses as opposed to any other calculations. (See Section 300 of the Employee Handbook, Board Ex.#4 and (Board Ex. #5, Faculty Handbook, Part II); see also T. 139)

Unlike staff, they are eligible for Bates Faculty Development Fund grants; fellowships and, for senior lecturers, sabbaticals. (See Board Ex. #5, Faculty Handbook, Part II, pp 57-60 of 109)

## C. Governance

The faculty's service responsibilities and role in the governance of the institution are particularly noteworthy and, again, provides a singular distinction between their work and that of all staff employees. As noted by Dean Hill, "the faculty share responsibilities for the curriculum, they create the curriculum and they have responsibilities for other ways we move business forward. (T. 341).

The Faculty Handbook states:

### ARTICLE I, SECTION 6: DUTIES OF THE FACULTY

Faculty are expected to enhance the learning environment of Bates College through high-quality instruction, consequential scholarship and creative work, and committed service that supports the institutional mission. All faculty should be effective in the classroom, participate in continuous development of the curriculum, provide strong academic advising and support of students, foster a culture of equity and inclusion, foster healthy professional relationships, and maintain commitment to each student's academic success.

**Faculty shall participate in the governance of the institution by participating in committee work and/or meetings and providing input on matters related to the curricular and academic aspects of the institution.** (Board Ex. #5; emphasis added)

\*\*\*\*\*

**Bates faculty have a responsibility to contribute to the shared governance of the institution and to contribute to the collective goals of the College and its curriculum as well as to the broader communities in which they participate as professionals and engaged citizens.** (*Id.*; emphasis added)

The involvement of faculty in the governance of the institution is therefore both a privilege and a job duty for them, and it is one that is managerial in nature, something with which no staff



employee is involved.<sup>3</sup> The particular governance functions with which faculty, including contingent faculty, are involved include membership on a wide range of boards and committees that deal with faculty matters; reappointment, promotion and tenure processes; student issues; and program and curriculum development, among many other areas. (See Faculty Handbook, Part IB, Articles IV- VI; Board Ex. #5)

### **III. ARGUMENT**

**A. There are compelling reasons for the Board to grant this Request because a substantial question of law is raised due to the absence of officially reported Board precedent, namely, whether an appropriate bargaining unit at an institution of higher education can include contingent faculty along with all other professional and non-professional staff.**

In this case, even though the College was precluded by the Regional Director from presenting evidence and argument on the inappropriateness of including contingent faculty with all other College staff employees, the Regional Director nevertheless had an obligation to determine whether or not the Petitioner's proposed bargaining unit was appropriate. The Regional Director instructed the hearing officer to take such evidence, and, in doing so, opened the door to a four-day hearing with considerable testimony and documentary exhibits to ascertain the appropriateness of a single unit that would include all of the College's professional and non-professional staff members<sup>4</sup> and all of its contingent faculty, excluding tenured and tenure-track faculty.

---

<sup>3</sup> Indeed, the involvement of tenured faculty in the establishment of the curriculum and other governance activities was at the heart of the Supreme Court's exclusion of full time tenured faculty from the provisions of the Act as managerial employees in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) While the instant case does not raise such issues as applied to the College's contingent faculty, the required involvement of contingent faculty in governance activities is a singularly distinct and important basic right (and obligation) of faculty compared to staff employees.

<sup>4</sup> Except for the traditional exclusions for supervisors, managers, confidential employees and guards, and subject to *Sonotone* balloting by the professional employees.

Despite overwhelming evidence that there was not a sufficient community of interest between faculty and staff, the Regional Director concluded that “a wall-to-wall petitioned-for unit of professional and non-professional employees is appropriate.” (Decision, p. 3). While the College was precluded from offering evidence or arguments below, it should have standing to request that the Board correct the erroneous finding of the Regional Director and set aside her decision, especially in a case like this one where there is no Board precedent to rely upon on the substance of the issue.

The Regional Director states that wall-to-wall units are appropriate on college campuses, citing *Livingstone College*, 290 NLRB 304 (1988). However, a wall-to-wall unit *that includes faculty* is *not* presumptively appropriate as the Director claims, as such presumption has never been established by case law. Therefore, it is the burden of the petitioning union to establish a community of interest among the employees it seeks to represent. By the Regional Director’s own admission, “although wall-to-wall units generally do not include faculty, I can see no case in which the Board *rejected* the proposition that faculty may be included in such a unit if they so choose.” (Decision, p. 9). However, there is equally no case in which the Board *approved* such a unit. *Indeed, there is no Board precedent at all in which the issue of whether faculty of any sort share a sufficient community of interest with staff to be in the same bargaining unit has been litigated.* This is a case of first impression, and it is a critically important issue for institutions of higher education and the labor organizations that seek to organize the employees of such institutions. Guidance on this issue will serve the public interest.

According to the National Center for Educational Statistics, there are almost 3000 private four-year institutions that would potentially be subject to the Board’s jurisdiction.<sup>5</sup> For those

---

<sup>5</sup> <https://nces.ed.gov/fastfacts/display.asp?id=84>

institutions, the national trend for many years has been a decline in the employment of tenured and tenure-track faculty and a marked increase in the use of contingent faculty (both adjuncts and lecturers). At many institutions, contingent faculty constitute a majority of the instructors of students on college and university campuses and, over the past decade, have become a targeted group of interest to organizing unions.<sup>6</sup>

In addition to their growing numbers, it is also important to point out that tenured and tenure-track faculty have largely been found to be managerial employees under the Supreme Court's *Yeshiva* case and Board interpretations of that case. Petitions to represent tenured/tenure-track faculty are few and far between. Consequently, there has been rapid organizing of adjunct faculty and other contingent faculty in the past few years as they have largely been immune from arguments that they are managerial in nature.<sup>7</sup> William Herbert, the Executive Director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions noted in 2017 that in the previous five years, unionization activity increased over 25% in the private higher education sector, mostly in the formation of adjunct faculty units.<sup>8</sup> That trend continues today.<sup>9</sup>

---

<sup>6</sup> <https://www.seiu888.org/2013/04/29/boston-area-adjunct-faculty-launch-citywide-push-to-form-union/>

<sup>7</sup> [http://www.hunter.cuny.edu/ncscbhep/assets/files/2020\\_Whats%20Behind%20Unions%20Higher%20Ed%20Organizing%20Boom\\_Law360.pdf](http://www.hunter.cuny.edu/ncscbhep/assets/files/2020_Whats%20Behind%20Unions%20Higher%20Ed%20Organizing%20Boom_Law360.pdf);  
<https://www.wnylabortoday.com/news/2021/03/02/organizing-news-from-across-the-u.s.a./recent-labor-victories-for-adjunct-professors-signal-likely-uptick-in-contingent-faculty-organizing/>;  
<https://www.nea.org/advocating-for-change/new-from-nea/we-stepped-and-fought-back-behind-explosive-growth-new-faculty>

<sup>8</sup> <https://scholars.unh.edu/radio/55/>

<sup>9</sup> <https://www.aaup.org/sites/default/files/10112018%20Data%20Snapshot%20Tenure.pdf>

Whether such adjuncts and contingent faculty should be potentially placed in wall-to-wall units with other employees across the institution or whether they should be entitled to their own bargaining unit, then, is a timely question that will be raised in many future petitions for representation. Accordingly, the placement of adjuncts and other contingent faculty will necessarily be a critical issue in future cases, and guidance is needed from the Board on whether such contingent faculty properly belong in an otherwise-staff employee unit.

The College's Request for Review should be granted on this important issue so that the Board may consider the question in general and the Regional Director's ruling in particular.

**B. The Regional Director's Decision that faculty do not have a sufficiently distinct community of interest to warrant their exclusion from an otherwise wall-to-wall unit is clearly erroneous.**

**1. General Community of Interest Considerations**

Having correctly taken up the issue of determining the appropriate unit question in this case, the Regional Director then made a clearly erroneous finding based on this record to approve the inclusion of contingent faculty in the unit alongside of all other eligible staff employees at the College. The contingent faculty that the Director included with staff employees in this case simply do not share an internal community of interest with the rest of the bargaining unit.<sup>10</sup> This renders the unit inappropriate.

Before turning to the particulars of this case, it is important to reiterate that a wall-to-wall unit that includes faculty is *not presumptively appropriate* because there are no cases in which faculty and staff have been merged into a single unit. Therefore, because the proposed unit is not

---

<sup>10</sup> It is worth noting that the contingent faculty constitute a substantial number of the entire unit if professionals vote to be in the same unit as nonprofessionals and they actually constitute a majority of the professional employees group itself. Their inclusion or exclusion from the unit, therefore, may play a critical role in the outcome of the election.

*presumptively* appropriate, it is up to the petitioner to show that the proposed unit is appropriate.

The Regional Director erred in finding that the petitioner's burden had been met. *Allen Health Care Services*, 332 NLRB 1308 (2000); *see also* NLRB Hearing Officer's Guide, pg. 72.

At the outset, the analysis in any case like this must begin by assessing whether the classifications in the petitioned-for unit share sufficient interests among themselves, pursuant to the traditional community of interest criteria. The Board has historically considered the following factors under its traditional community-of-interest test:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." *The Boeing Company*, 369 NLRB No. 67 (2019) slip op. p. 2 (*quoting United Operations, Inc.*, 338 NLRB 123, 123 (2002))

As the Board noted in *The Boeing Company*:

...the traditional community-of-interest standard is not satisfied if the interests shared by the petitioned-for employees are too disparate to form a community of interest within the petitioned-for unit. See *Saks & Co.*, 204 NLRB 24, 25 (1973); *Publix Super Markets, Inc.*, 343 NLRB 1023, 1027 (2004) .... In sum, the analysis logically begins by considering whether the petitioned-for unit has an internal community of interest using the traditional criteria discussed above. A unit without that internal, shared community of interest is inappropriate. *The Boeing Company*, *supra*, slip op. p.3

## **2. Erroneous application of community of interest factors by the Regional Director**

In making her decision on whether or not there was a sufficient "internal, shared community of interest," the Director wrote:

I have evaluated the community of interest among the petitioned-for employees. The record does not indicate that the interests of the petitioned-for employees are so disparate that they cannot be represented in the same, presumptively appropriate unit. It is true that the petitioned-for employees have varied skills, training and job functions, as is typical in a wall-to-wall unit. However, the employees enjoy similar benefits, are subject to many of the same policies, are functionally integrated and have frequent contact with one another at their common worksite. (Decision, pp. 8-9)

However, while claiming to have analyzed the record that her hearing officer established to make this fundamental decision, she failed to truly indicate how she reached her decision and there was little if any discussion about the distinct working conditions of the faculty.<sup>11</sup> Indeed, in reading the Decision, one is left with an impression of a stunningly facile analysis that can be summed up by saying that, since she could not find a Board case that *precluded* the idea of faculty and staff in the same unit, then she could find no reason not to do so here. She did highlight several community of interest factors sprinkled throughout her decision but did not weigh them against the significant number of distinguishing factors for faculty. Her minimal analysis cannot withstand scrutiny, for the record established a sharp differentiation between the community of interest factors for faculty compared to those of staff.

The record itself-- despite the inappropriate preclusion of evidence from the College-- is replete with examples of the clear distinctions that set the contingent faculty apart from all of the other employees in the proposed bargaining unit. To reach her erroneous conclusion that there is a sufficient community of interest between faculty and staff for them to be in the same unit, the Regional Director made reference to a small handful of factors that she believed established that community of interest. Among her limited findings:

1. All employees work on the same small campus and one can walk across campus in 10-12 minutes or so. (Decision, p. 3, 7)

---

<sup>11</sup> Multifactor tests “lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why.” *LeMoyne Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). Absent such explanations, a “totality of the circumstances” analysis can become “simply a cloak for agency whim.” *Id.*, quoted in *The Boeing Company*, fn.2

2. Employees in different departments have “opportunities to interact as they provide an all-encompassing experience for students or as they participate in the campus community.” For example, library staff and IT personnel may work with faculty in support of their work.
3. Athletic facilities are for use for all members of the community.
4. The 2016 Institutional Plan expressed a desire “to strengthen the integration of staff into the intellectual life of Bates” and that the “experiences, expertise and genuine care for and interest in our students that our staff bring to their work” are often as influential as classroom experiences.”
5. All employees have the same benefits and all employees are also subject to policies in the Employee Handbook.

While one may quibble with some of these findings (e.g. the misleading statement that all employees have the same benefits; faculty do share the same benefits as staff but they also have additional benefits as well), the real problem is the fact that the Regional Director studiously avoided the unique and substantial factors that comprise the work life of the faculty – factors that are consequential enough to distinguish them from staff and makes their placement in one unit wholly inappropriate and contrary to the very purpose of establishing “appropriate bargaining units” which is to define an arena where employees of common interest can work towards a collective bargaining agreement that reflects those interests. Indeed, the consequences of her decision, if the Union is successful in the election to follow, will likely be the creation of a nightmarish task for the parties of trying to resolve a college-wide collective bargaining agreement with extreme differences in the working conditions, aspirations and interests of faculty versus staff in that same unit.

First, let us look again at the cited factors that the Regional Director thought were important in establishing this unit. Her first point that the campus is small and that everyone may occasionally bump into each other is hardly a factor of real consequence in determining appropriate units. While it is true that traditional community of interest factors may indeed include the frequency of employee contact as a factor to consider,<sup>12</sup> this cannot outweigh the other community of interest factors and, in this case, the substantial differences between the employee groups in dispute. In many workplace settings, employees with very different interests and who carry out very different jobs may often see each other in the course of their work day. The fact that, for example, facility workers on campus may see a faculty member if performing an office repair, or that a dining worker may see faculty in the dining hall hardly establishes a common bond between faculty and staff on fundamental working conditions. Indeed, Vice President Swift appropriately called these simply “little moments” of contact when one employee encounters another during their work day. (T. 139)

Moreover, while contingent faculty may intermingle with staff from time to time, they are ironically much more likely to come into contact with and integrate their work *with the excluded tenured and tenure-track faculty* since they carry out the same primary function of teaching as tenured faculty; are all based in the same academic departments and units; and teach many of the same courses. They serve on common governance bodies and are required to engage collaboratively in such governance work as part of their obligations to the College.

Next, it is true that Bates certainly endeavors to instill in all of its employees the need for and the benefit of providing a nurturing environment for the students who come to the College and live on campus. This is a laudatory policy to enhance the College experience for students.

---

<sup>12</sup> *Kalamazoo Paper Box Corp.*, 135 NLRB 134 (1962);



But once again, it does not rise to the level of a true integration of work functions of sufficient import to bind the staff employees to the faculty. Nor does the fact that the College encourages all employees to care about the students mean that all employees share a sufficient community of interest to bargain together. Finally, the fact that benefit policies and other College policies apply to faculty and staff with equal force is indeed a relevant consideration but insufficient by itself to establish the appropriateness of a wall-to-wall unit with faculty. One may daresay there is hardly an institution that does not have a common set of medical insurance policies or retirement policies that apply to all faculty and staff.

Perhaps more significant, let us examine the factors that the Regional Director *ignored* in finding that contingent faculty should be in this unit. Somehow the Regional Director did not think it significant that, to paraphrase the Supreme Court in *Yeshiva*, the faculty help create the “product to be produced” of the College – namely, the curriculum – through their involvement in the governance of the institution.<sup>13</sup> No one else on campus has such a role.

The Regional Director paid scant attention to the significant differences in what faculty do as their main job functions compared to the rest of the staff. The College readily acknowledges that by definition a potential wall-to-wall bargaining unit will include employees with different job functions, such as a dining service worker versus a custodian or an administrative assistant. However, the distinction between what faculty do and what staff do is qualitatively unique in the setting of a college. Bates College exists to educate its students. If the very mission of the College is focused on the education of those students, which it most assuredly is, then it is the faculty, not the staff, who establish the curriculum and degree programs that are offered to students and who then teach that curriculum to the students of Bates

---

<sup>13</sup> *NLRB v. Yeshiva University* 444 U.S. 472, 486 (1980)

College in order for them to obtain their degree. The primary function of faculty is teaching. All of the faculty's work is enmeshed with the College's student population, as they are primarily the ones who teach and advise the students. Indeed, all of the non-faculty staff of Bates exist primarily for the purpose of *supporting the faculty's work* in different ways. This is not to minimize the important work of every College employee in their particular roles. But the staff and the administration are basically in service to the faculty so that the core mission of the institution can be carried out. That simply cannot be said about any other employment category in the proposed bargaining unit.

Neither did the Regional Director accord sufficient weight to the fact that the faculty have their own lengthy 109-page Handbook that outlines issues fundamental to the working life of a faculty member and which have no relevance to other staff employees. The Handbook provides details on reappointment, promotion and tenure procedures and contract length. The Handbook outlines special faculty benefits, distinct from staff. It delineates the extensive job security that faculty are granted; the protection of adequate cause for discipline and termination; and the security of term contracts of up to five years. It sets forth the governance system and the various committees upon which faculty serve.

Importantly, the Handbook protects the faculty members' academic freedom, a concept foreign to staff employees but one that has existed for over a century for faculty members everywhere. This foundational and time-honored right – the linchpin to enable faculty to conduct their teaching and research free from external interference<sup>14</sup>-- is applicable only to faculty and is

---

<sup>14</sup> Tierney and Corwin, "The Tensions Between Academic Freedom and Institutional Review Boards," *Qualitative Inquiry* (Vol.13 Number 3, April 2007)

at the core of the working life of faculty members. It is not even mentioned as a distinguishing element in the Regional Directors' Decision.

As noted in the Facts, the Decision ignores an array of other differences between faculty and staff, differences that separate the two groups logically into very different employment worlds. While faculty and staff may intermingle on the small Bates campus, they have little in common in terms of what is important in their work life, outside of the expected mutual interest in improving their compensation and benefits. Most staff employees, both professional and non-professional, come to bargaining tables with interests in improving time off, adding holidays, increasing vacation time, being clear about the calculation of accrued benefits, enhancing sick leave policies, adding more personal days, enhancing overtime provisions and call-in provisions, clarifying hours of work, obtaining flexible work schedules and establishing processes for dealing with job descriptions, among other issues. These are not the subjects that motivate faculty in negotiations. The faculty are more likely to be concerned about the length of their individual contracts; notice of reappointments and non-reappointments; evaluation and reappointment procedures; opportunities for promotion in rank; protection of academic freedom; number of courses to teach and student advising to conduct, the level of required service work on governance committees and intellectual property. By ruling that faculty must be part of the larger staff employee group, the Regional Director has assured that two large and clearly delineated groups of employees will come to the bargaining table concerned about very different things.

### **3. The Board's own guidance accords faculty separate bargaining unit status.**

While everyone in a wall-to-wall unit may have different work functions, the Board has always recognized the unique nature of faculty and those who carry out teaching at a college or university, and in its unit decisions, it has always drawn clear distinctions between those who

teach and those who do not. In the *Outline of Law in Representation Cases*, the Board itself notes that unit cases involving faculty are separate and apart from non-faculty staff cases.

Turning to groupings *other than faculty* and those engaged in functions closely related to teaching, “the Board applies the rules traditionally used to determine the appropriateness of a unit in an industrial setting.” *Livingstone College*, 290 NLRB 304, 305 (1988); *Cornell University* 183 NLRB 329, 336 (1970).<sup>15</sup>

In previous cases, the Board has excluded other types of campus employees from faculty bargaining units, thus providing further indirect evidence of the lack of community of interest between faculty and support staff. For example, laboratory personnel are often excluded from faculty bargaining units unless they carry a full teaching load. See, for example, *Point Park College* 209 NLRB 1064, 1065 (1974) (However, in that case, a program coordinator who was a member of the education department *and had a full-time teaching load* was included). See also *Long Island University, C. W. Post Ctr.*, 189 NLRB 904, 907 (1971)

In *Florida Southern College*, 196 NLRB 888, 890 (1972), certain employees excluded from a faculty unit did have faculty status, but their work was directed towards administrative functioning only. None of them were engaged in teaching and were not required to have advanced knowledge. Their particular duties and knowledge were also not related to a field of science within the purview of the teaching profession). See also *Tusculum College* 199 NLRB 28, 31 (1972) (administrative personnel do not share community of interest with classroom faculty because they worked on a different schedule, had separate supervision, and were primarily viewed as administration rather than faculty); *Northeastern University* 218 NLRB 247, 255 (1975) (academic administrators and counselors do not share a community of interest with faculty. Not required to have knowledge of advanced type, or perform intellectual tasks and their duties only required a knowledge of University’s curriculum and services); *Rensselaer*

---

<sup>15</sup> *Outline of Law in Representation Cases*, Section 15-262

*Polytechnic Institute* 218 NLRB at 1439-1440 (1975) (associate and assistant deans excluded from faculty unit); *Mercy College* 231 NLRB 315, 316 (1977) (director of athletics excluded because his work was primarily administrative and lacked a community of interest with faculty); *Goddard College* 216 NLRB 457, 457-458 (1975) (Board excluded “masters program faculty” from a unit of undergraduate full time faculty because the masters program faculty had working conditions unique from the undergraduate faculty, especially because they carried administrative, non-teaching duties and had little contact with the petitioned faculty)

While all of these decisions arose in different contexts than the instant case, they do underline a consistent Board theme over the years that support staff, whether professional or not, do not belong in faculty bargaining units. Conversely, it is equally clear that faculty should not be placed in bargaining units largely dominated by staff members.<sup>16</sup>

#### **4. State legislatures and labor boards typically separate faculty from other employee bargaining units**

Finally, while not at all binding on the Board, it is worth noting that state legislatures and labor boards have often separated out faculty from all other campus employees in the public sector, either through specific legislation or public labor board decisions. For example, in the

---

<sup>16</sup> While there are no decisions involving the placement of contingent faculty with staff in a single unit, the Board has also recognized the unique nature of bargaining units in higher education when it refused to include part-time contingent faculty like adjuncts in the same unit as tenured faculty, departing from its usual approach of including regular part-timers in the same unit as full-time employees. *New York University*, 205 NLRB 4, 6 (1973); *Rensselaer Polytechnic Inst.*, 218 NLRB 1435, 1438 (N.L.R.B. 1975); see also *Bradford College*, 261 NLRB 565, 567 (1974)<sup>16</sup> See also *Trustees of Boston Univ. v. NLRB.*, 575 F.2d 301, 308 (1st Cir. 1978), *vacated on other grounds*, 445 U.S. 912 (1980) If the Board can find that part-time faculty should not be in the same unit as full-time faculty – despite both groups performing the essential task of teaching – then it strains belief that the contingent faculty in this case should be in the same unit as dining workers, facilities workers, administrative and other staff.

State of Maine itself, the legislature provided the following in its public sector labor relations law.

[I]n order to foster meaningful collective bargaining, units shall be structured in such a way as to avoid excessive fragmentation whenever possible. In accordance with this policy, bargaining units shall be structured on a university system-wide basis **with one unit for each of the following occupational groups: A. Faculty; B. Professional and administrative staff; C. Clerical, office, laboratory and technical; D. Service and maintenance . . .**” Me. Rev. Stat. tit. 26, § 1024-A (emphasis added)

In the State of Washington, the law authorizing collective bargaining for university employees provides that each state institution must have a single faculty bargaining unit. Thus, the provisions of RCW 41.76.005, section 11 states:

"Bargaining unit" includes all faculty members of all campuses of each of the colleges and universities. Only one bargaining unit is allowable for faculty of each employer, and that unit must contain all faculty members from all schools, colleges, and campuses of the employer.

In California, under the Higher Education Employer-Employee Relations Act, Chapter 12, Section 3579(5)(e), University faculty may choose to be represented in only two kinds of units. One is a unit that is limited to and must include all eligible faculty/academic Senate members *on one campus*. The other is limited to and must include all eligible faculty/academic Senate members *in the entire University of California system*. Non-faculty are not to be included in such faculty units.

See also similar provisions in the Hawaiian labor laws governing higher education:

“(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit: . . . (7) Faculty of the University of Hawaii and the community college system; (8) Personnel of the University of Hawaii and the community college system, other than faculty . . .” Haw. Rev. Stat. Ann. § 89-6 (West)

In *Association of Pennsylvania State Colleges v. Commonwealth of Pennsylvania Labor Relations Board*, 383 A.2d 243, 34 Pa. Cmwlth. 239 (1978), the Commonwealth Court of

Pennsylvania affirmed the exclusion of certain administrators *without* faculty status from a unit of administrators *with* faculty status, noting that even though many of the administrators did similar work, those with faculty status were entitled to sabbatical leave; had different sick leave provisions; could attain tenure; could sit on governance committees and held faculty rank.

These few public sector examples, along with the previously-cited NLRB cases, all suggest a national perspective that faculty should be organized in their own bargaining units separate and apart from those of staff members.

For all these reasons, the decision of the Regional Director to merge contingent faculty with all other employees on campus is clearly erroneous and should be vacated.

**C. The Regional Director erred in ruling that the College was precluded from presenting evidence and argument on the question of the appropriateness of the petitioned-unit because its Statement of Petition was served on the Petitioner one day late**

While the hearing officer created a record in order for the Regional Director to make a required determination on whether the petitioned-for unit was appropriate, the College was denied by the Regional Director the opportunity to present facts and arguments challenging the unit as inappropriate. This ruling was erroneous and prejudicial to the College and warrants the Board granting this Request for Review.

As counsel for the College explained at the hearing, Section 102.66(d) “does not establish an inflexible bright line standard requiring preclusion in all cases involving untimely service of a statement of position.” (T. 642) For example, in Board decisions that have applied the preclusion rule, the Board repeatedly emphasized that the late filing party had not offered any justification or excuse for its untimely service. *Williams Sonoma Direct, Inc.*, 365 NLRB N0. 13 \*2 (2017) (no information provided concerning the cause of the delay but the service occurred more than three days late, on the day the hearing was originally scheduled to begin); *URS Fed. Services*,

*Inc.*, 365 NLRB. No. 1 (2016) (voting list never served by the employer, which “ha(d) not offered any explanation for failing to do so”). *Brunswick Bowling Products LLC*, 364 NLRB, No. 96 (2016). In the *Brunswick* case, where the service was several hours late, the Board also emphasized that the union did not file a motion for extension of time to file and serve its statement of position and provided no explanation for failing to serve its statement of position in a timely manner.

These decisions must be read to indicate that Rule 102.66 does in fact provide for some flexibility under appropriate circumstances. Even if Rule 102.66(d) does not contain express exceptions, the Board clearly left open the possibility that a Regional Director could exercise discretion to excuse untimely service under extenuating circumstances, or else there would have been no reason for the Board to have repeatedly emphasized the fact that the filing parties in other cases had failed to offer a satisfactory explanation for their errors.

Further, the Regional Director should have accepted the Employer’s Statement of Position as timely under Rule 102.5 governing general service of papers, and Rule 102.63 governing statements of position. Whether read separately or together both these rules allow the Regional Director to accept a late served document. Rule 102.5 subsection 1 provides that late service of a document can result in either (1) the document being rejected; or (2) allowance of additional time for the opposing party to respond. The Board's intent here is clear that the Regional Director should not reject a late served document *when the late service can be cured by other means*.

Here the Employer's counsel repeatedly offered the Union additional time to respond and/or to delay the hearing. The Union indicated to counsel that it did not need more time. It actually filed its own statement of position early, and later requested a one-day postponement of



the hearing to which the Employer agreed, with no suggestion or claims of prejudice whatsoever by the Employer's late service.

Moreover, in this case, the Employer clearly had good cause for the delay in serving the Union. As explained at the hearing, a COVID infection in counsel's home had made both his daughter and his wife sick with COVID just prior to filing. Both of them had significant symptoms. His wife is a high-risk patient. And the last-minute switch to working from home that he had to undertake in order to care for his family all contributed to the oversight of making timely service, which was cured the next day. Under these circumstances the Regional Director's failure to find good cause for extension or amendment was an abuse of discretion and resulted in manifest injustice completely out of proportion to the nature of the error, particularly given the complete lack of prejudice. (T. 644)

For all these reasons the Employer believes that it should not have been precluded from presenting witnesses and exhibits, questioning the petitioner's witnesses, and filing a post-hearing brief. The Employer further contends that precluding meaningful participation in this hearing is both a denial of due process, a central tenant of which is the right to be heard, and a denial of fundamental fairness. In further support of its position the Employer notes that these arguments were presented to the Regional Director in writing through electronic filings made by the Employer on October 28 and 29. These filings are Employer's Exhibits 4 and 5, which the Hearing Officer placed in what he designated as the Rejected Exhibits file. (T. 637)

**D. To the extent the Regional Director was following Board rules and precedent in her ruling on preclusion, there are compelling reasons for reconsideration of such rules and precedent**

The preclusion rule found in Rule 102.66(d) first came into the Board's regulations in 2014 in conjunction with the new requirement that an employer named in RC petition must file a

statement of position setting forth its position with respect to the petitioned-for unit. 79 FR 74308-01 (December 15, 2014). Employers were previously required to take positions on the petitioned-for unit orally at the hearing (not before) and at times used this approach to delay or obstruct the expeditious processing of the petition. According to the Board, Section 102.66(d)'s preclusion rule was intended to prevent such gamesmanship. The Board explained:

Preclusion regarding the statement of position is justified by the rulemaking record and the Board's experience demonstrating that non-petitioning parties sometimes do not share the information solicited by the statement of position form prior to the hearing, or they take shifting positions on the issues at the hearing. Such conduct impedes efforts to reach election agreements or hold orderly hearings. 79 FR 74425.

Here, the Region applied 102.66(d)'s preclusion rule to prevent the College from presenting its own testimony and evidence on the inappropriateness of the petitioned-for unit despite the tardy service of one day only being an excusable oversight.

Preclusion under Section 102.66(d)'s preclusion rule in the circumstances of this case is both inconsistent with the rule's intended purpose and punishes inadvertent error even though there was *no impact* on the Union's ability to respond to the College's positions. Applied as it was here, in an automatic fashion with no consideration of whether or not there was good cause for the delay or whether it harmed the other side in any way, and scant recognition of the significance of the request for an unprecedented unit configuration - the Rule becomes an instrument of injustice. Its application has prevented a party from addressing a fundamental question that will impact collective bargaining and labor relations for those parties for decades to come. Bargaining units, once defined and once a labor organization succeeds in being certified in such units, are rarely modified to any substantive degree and, in setting the arena in which collective bargaining will take place, they are among the most consequential decisions that can be made. To deny one party the opportunity to fully participate in the litigation surrounding such

matters because of a technicality is an injustice of the highest order. Harm caused by such errors or delays in filing a statement of position can easily be cured by extensions of time for response and similar adjustments. The door to fully litigate and have due process does not need to be slammed shut for such a minor error. The rule must be reexamined.

#### IV. CONCLUSION

With full recognition that the decision of the Board to grant a Request for Review is discretionary, the College would submit that this particular case provides ample justification and compelling reasons to grant its Request. For all the reasons cited, the College urges the Board to grant this Request for Review.

December 30, 2021

Respectfully Submitted,

PRESIDENT AND TRUSTEES OF  
BATES COLLEGE

By its attorneys,

James R. Erwin, Esq.  
Pierce Atwood LLP  
254 Commercial Street  
Merrill's Wharf  
Portland, ME 04101

Nicholas DiGiovanni, Esq.  
Rachel Adams Ladeau, Esq.  
Morgan, Brown & Joy, LLP  
200 State Street  
Boston, MA 02109

//James R. Erwin//  
James R. Erwin



\_\_\_\_\_  
Nicholas DiGiovanni

/s/ Rachel Adams Ladeau  
Rachel Adams Ladeau

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of this Request for Review of the Regional Director's Decision and Direction of Election was filed electronically today, December 30, 2021, using the National Labor Relations Board's E-Filing system, and a copy was sent by electronic mail to the following:

Jeffrey Neil Young, Esq.  
Solidarity Law  
9 Longmeadow Rd.  
Cumberland Foreside, ME 04110  
jyoung@solidarity.law  
Counsel for Union

Angela Macwhinnie  
Maine Service Employee Association  
65 State St.  
Augusta, ME 04330  
Angela.macwhinnie@mseaseiu.org

Laura A. Sacks, Regional Director  
National Labor Relations Board, Region 1  
10 Causeway Street  
Room 601  
Boston, MA 02222-1001  
Laura.Sacks@nlrb.gov

Elizabeth C. Person  
Secretary to the Regional Director for Region 1  
National Labor Relations Board  
A.A. Ribicoff Federal Building  
450 Main Street, Suite 410  
Hartford, CT 06103  
Elizabeth.Person@nlrb.gov

Daniel R. Strader, Esq.  
James R. Erwin, Esq.  
Pierce Atwood LLP  
254 Commercial Street  
Merrill's Wharf  
Portland, ME 04101  
dstrader@pierceatwood.com  
jerwin@pierceatwood.com  
Counsel for Employer

Dated: December 30, 2021

/s/ Rachel Adams Ladeau  
Rachel Adams Ladeau